

CHAPTER 48-02.1

INFRASTRUCTURE DEVELOPMENT BY PRIVATE OPERATORS

48-02.1-01. Definitions. As used in this chapter, unless the context or subject matter otherwise requires:

1. "Build, operate, and transfer facility" means a build, operate, and transfer fee-based facility constructed, improved, or rehabilitated and afterward operated by a private operator who holds title to the facility subject to a development agreement that includes a provision that title will be transferred or revert to the public authority on expiration of an agreed term.
2. "Build, transfer, and operate facility" means a build, transfer, and operate fee-based facility constructed, improved, or rehabilitated by a private operator who:
 - a. Transfers the interest it may have in the facility to the public authority before operation begins; and
 - b. Operates the fee-based facility for an agreed term pursuant to a lease, management, or concession agreement.
3. "Development agreement" means a written agreement by and between a public authority and a private operator which memorializes the parties' agreement with respect to the construction, improvement, rehabilitation, ownership, or operation of a fee-based facility. A development agreement must satisfy the requirements of section 48-02.1-03.
4. "Fee-based facility" means a facility that provides a service in which the charge is based on the level of service by users or a rental fee paid by a public authority. The facility may be a library, city hall, and an appurtenant building, a water or sewage treatment plant, or other public improvement; land lying within applicable rights of way; and other appurtenant rights or hereditaments that together comprise a project for which a private operator is authorized to operate or own and impose fees or derive a rent as expressed in the development agreement.
5. "Private operator" means a private person, a corporation or partnership, a cooperative or unincorporated association, a joint venture or consortium that constructs, improves, rehabilitates, owns, leases, operates, or manages a fee-based facility subject to this chapter. The term includes related parties and entities that together perform some or all of these functions for the same facility.
6. "Public authority" means the state subject to legislative authority, a county, township, or city when ownership of or jurisdiction over a fee-based facility has been tendered to and accepted by said authority.

48-02.1-02. Private operators. Notwithstanding any other provision of law, private operators may construct, improve, rehabilitate, own, lease, manage, and operate fee-based facilities subject to the terms of this chapter. Private operators may mortgage, grant security interests in, and pledge their interests in, for a period not to exceed the length of the development agreement:

1. Fee-based facilities and their components;
2. Development, leases and concessions, and other related agreements; and
3. Income, profits, and proceeds of the fee-based facility.

48-02.1-03. Public authority may enter into development agreement. A public authority may solicit or accept proposals from private operators for the constructing, improving, rehabilitating, operating, managing, and owning of a fee-based facility that will be situated in an area subject to the public authority's jurisdiction. After a hearing, the public authority may accept a proposal that it determines to be in the public interest. A public authority may negotiate and enter into a development agreement with any private operator.

48-02.1-04. Contents of development agreements. A development agreement for a fee-based facility entered into pursuant to this chapter may provide for private ownership of the facility without reversion of title; for operating the facility under lease or management contract; for build, operate, and transfer facilities or build, transfer, and operate facilities; or any other form of ownership or operation considered advisable by the public authority. A development agreement may permit the private operator to:

1. Assemble funds from any available source, including federal, state, and local grants, bond revenues, contributions, and pledges; and
2. Incorporate related improvements into the fee-based facility, subject to requirements of state and federal law.

A development agreement may also include grants of title, easements, rights of way, and leasehold estates that are necessary to the fee-based facility. In addition, a development agreement may authorize the private operator to charge variable-rate fees based on time of day, characteristics of services, or other factors and measurement methods considered significant by the public authority for the particular facility.

48-02.1-05. Right-of-way acquisition. Private operators may acquire right of way and property by donation, lease, or purchase. When necessary for the construction, alteration, addition, extension, or improvement of any project under this chapter, a public authority may acquire any real or personal property by the law of eminent domain of this state and may lease the property or right of way to a private operator.

48-02.1-06. Lease term. A lease for public facilities must be for terms of no more than fifty years and must be reviewed and may be revised every five years.

48-02.1-07. Application of other law. This chapter does not excuse private operators of fee-based facilities from the necessity of obtaining environmental, navigational, design, or safety approvals that would be required if the facility were constructed or operated by a public body.

48-02.1-08. Public authority may facilitate projects.

1. A public authority may exercise any power possessed by it with respect to the development and construction of infrastructure projects to facilitate the development and construction of infrastructure projects under this chapter.
2. A public authority may provide services for which it is reimbursed with respect to preliminary planning, planning, environmental certification, and preliminary design of infrastructure projects.

48-02.1-09. Development agreements - Mandatory provisions. A development agreement must require:

1. That the plans and specifications for the fee-based facility satisfy the public authority's standards of construction for infrastructure of the same functional classification;

2. For fee-based facilities to be incorporated into the existing infrastructure, that any applicable department or authority review and approve the facility to the same extent as it would for a similar publicly constructed facility;
3. That, after public notice, the private operator manage and operate a fee-based facility in cooperation with the applicable public authority and subject to any bylaws that the public authority and the private operator may from time to time mutually agree upon;
4. That the fee-based facility be subject to regular safety inspections by the applicable public authority;
5. That the anticipated fees, rental income, and revenues from the operation of the facility, or other sources of funding, or any combination thereof, be sufficient to pay the maintenance and operation costs for the facility, and principal of and interest on any evidence of indebtedness to finance the facility; and
6. Any other provisions negotiated by the parties.

48-02.1-10. Cost recovery. Development agreements entered into under this chapter may authorize private operators of fee-based facilities to impose a fee-based charge for the use of the facility and must require that the fee revenues be applied:

1. To repayment of indebtedness incurred for the fee-based facility;
2. To lease or fee-based concessions payments, if any;
3. To costs associated with the operation, administration, and maintenance of the facility; and
4. To reasonable reserves for future capital outlays, if any.

Residual fee revenues belong to the private operator, except for any royalties that may be payable to a public authority under the development agreement or a related fee-based concession agreement. After the expiration of any lease for a build, transfer, and operate facility, or after title has reverted for a build, operate, and transfer facility, the public authority may continue to charge a fee for the use of the facility.

48-02.1-11. Joint authority. When a fee-based facility is or will be situated in the jurisdiction of more than one public authority, or is or will be an interstate or international facility, the applicable authorities concerned may enter into a compact to delegate to one or more of the authorities or a board appointed by the various authorities the authority to exercise all of the powers, duties, and functions of the other authorities regarding the fee-based facility, including the authority to negotiate and administer the development agreement and any related lease and fee-based concession agreement. In addition, if all public authorities having jurisdiction over a fee-based facility concur, title to or authority over the facility may be tendered to the agreed-upon authority of choice, which may at its option accept the title of authority to administer pursuant to the development agreement and this section.

48-02.1-12. Property tax exemptions - Exemptions from bidding requirements.

1. If approved by the governing body of the city, for property within city limits, or by the governing body of the county, for property outside city limits, new fee-based facilities are exempt from all ad valorem taxes.
2. For portions of the project that do not involve contractor ownership, the construction, improvement, rehabilitation, operation, and management of fee-based facilities by private operators under this chapter are subject to all competitive bidding and procurement requirements otherwise applicable under state and local laws, rules,

and ordinances, if so determined by resolution of the governing body of the public authority.

48-02.1-13. Relation to other law. The rights, powers, and authority conferred by this chapter are in addition to other rights, powers, or authority private operators and public authorities may have under other law. This chapter does not supersede or repeal, expressly or by implication, any other law permitting the construction, improvement, rehabilitation, ownership, and operation of fee-based facilities by private operators.